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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHANN KEIL, Plaintiff and Appellant; CATHERINE KEIL, Plaintiff and Respondent, v. BEST, BEST & KRIEGER, LLP, et al., Defendants.	G040493 (Super. Ct. No. 06CC05007) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Daniel J. Didier, Judge. Request for judicial notice. Order affirmed. Request granted.

Haney Buchanan & Patterson, Bruce Fields, Steven H. Haney; Dreier Stein Kahan Browne Woods George and Gene F. Williams for Plaintiff and Appellant.

Arent Fox, Roy Z. Silva and Charles P. Rullman for Plaintiff and Respondent.

No appearance for Defendant.

* * *

Plaintiff Johann Keil (appellant) appeals from an order granting plaintiff Catherine Keil's (respondent) motion to disqualify attorney Steven R. Haney and the law firm of Haney Buchanan & Patterson (collectively Haney) from representing appellant in the underlying legal malpractice action. Appellant also has requested we take judicial notice of a letter from the State Bar of California finding insufficient grounds for disciplinary action on a complaint filed by respondent against Steven R. Haney and another attorney with the Haney firm presumably involving their conduct in this lawsuit. We shall grant the request for judicial notice, but affirm the disqualification order.

FACTS

In April 2006, appellant, represented by Haney, sued the law firm of Best, Best & Krieger LLP and attorney Dwight M. Montgomery (defendants) for legal malpractice, breach of fiduciary duty, fraud, and breach of contract. The complaint generally alleged that, while appellant and respondent were still married, they retained defendants to represent them and their two corporations in a dispute with the Internal Revenue Service over audits and alleged tax deficiencies. During proceedings before the United States Tax Court, Montgomery entered into a settlement with the Internal Revenue Service without the knowledge or consent of appellant and respondent. After they learned of the settlement, appellant and respondent moved to vacate it. The tax court conducted an evidentiary hearing at which both appellant and respondent testified. The court granted their request, issuing a 23-page opinion summarizing the evidence and reasons for its decision.

By the time appellant filed the legal malpractice complaint he and respondent had dissolved their marriage. In November 2006, respondent signed a retainer agreement with Haney allowing it to represent her in this action. The agreement identified respondent as the firm's only client "in this Matter," but acknowledged the firm's fees would be paid "pursuant to the . . . retainer . . . agreement with [appellant]" and that "[a]s consideration for signing this retainer . . ., [appellant] agree[d] to repay certain loans that are due pursuant to the divorce settlement between the Keils."

At the same time, appellant and respondent signed the following conflict of interest waiver: "I have advised both of you that from this point forward I will jointly represent your interests. As is always the case in any situation involving joint representation, there is always a potential conflict of interest. In this case, I believe your interests are presently aligned in the sense that both of you have the same litigation objective - - which is to keep the maximum recovery against [defendants]. By signing below, you acknowledge that you both agree to my joint representation of you, and further agree to waive any conflict of interest which may arise."

In June 2007, defendants filed a discovery motion alleging "plaintiffs failed to appear for deposition and failed to produce any documents" in response to their discovery requests. Shortly thereafter, Haney moved to be relieved as counsel for respondent, claiming she "has not cooperated with [the] firm in providing discovery responses, documents and deposition dates" and "attempted to communicate with opposing counsel . . . without our knowledge." The court granted the request. Respondent then retained attorney Candace Van den Bosch to represent her.

Haney and defendants subpoenaed respondent to appear for a deposition in March 2008. She failed to appear. Around this time, respondent discharged Van den Bosch as her attorney. Haney then obtained a court order directing respondent to appear for a deposition on April 11. Again, she failed to appear. According to respondent, she

had suffered a knee injury requiring hospitalization several days earlier and had informed Haney of her circumstances.

On April 16, defendants filed a motion for terminating sanctions against respondent for "misuse of the discovery process" that, in part, sought an order "prohibiting [respondent] from testifying at trial . . . ." A week later, Haney filed an ex parte application for an order to show cause seeking to hold respondent in contempt for her failure to appear for the deposition. The same day, Haney served respondent at the hospital with subpoenas for a deposition and trial. In an April 23 declaration opposing appellant's order to show cause, respondent stated, "I always intended to appear at [the] deposition," and she "would agree to appear for [a] deposition on a mutually convenient date early next month."

Respondent retained present counsel and, on May 7, moved to disqualify Haney from representing appellant. According to her declaration supporting the motion, respondent claimed that when she "retained the Haney Firm, I provided Mr. Haney confidential information regarding my conversations with . . . Montgomery . . . ." She also stated that "[d]uring the . . . time that the Haney Firm represented me, I came to realize that [Haney] was not zealously pursuing my interests[]" but "was really aligned with [appellant] . . . ." After respondent discharged Van den Bosch, appellant began sending her e-mails "threatening to use the Haney Firm against me," promising "to 'turn [the firm] loose on [me]' to get cooperation . . . ." The disqualification motion argued Haney, which "formerly represented [respondent] in this very action," was now violating its duty of loyalty by "taking a position adverse to [her]" by "seeking contempt sanctions . . ., invading her hospital room to serve her with process, and otherwise taking an actively hostile and adverse position toward her."

In appellant's opposition, he argued "there is no existing conflict and the [disqualification] motion is brought for, at worst, what was a one time dereliction, and [respondent's] anger over that incident," and that "granting the . . . motion . . . would

severely prejudice both [plaintiffs]" because of Haney's past involvement and knowledge of the case. The opposition also claimed Haney's "proposed deposition questioning [of respondent] is . . . limited . . . to reaffirmation of [her] testimony and authentication of documents" cited by the tax court's opinion granting plaintiffs' motion to vacate the settlement, and "this testimony involves no breach of confidentiality . . . ."

In a supporting declaration, attorney Steven Haney denied respondent provided him with any confidential information and claimed that after his firm withdrew as respondent's attorney, she attempted "to settle the case without [appellant's] involvement, even though both of their claims [against defendants] constitute a community asset pursuant to their divorce agreement[,]" and thereafter "would not participate as a witness in the case . . . ." Attached to his declaration was an April 11, 2008 e-mail he received from respondent stating, "I am fully prepared to tank the case if [appellant] refuse[s] to pay his obligations. . . . Unless he realizes this, I am . . . planning to do nothing."

The court granted the motion. Describing the November 2006 conflict waiver as "bare boned," it held Haney "failed to obtain proper informed consent from [appellant] and [respondent] before accepting joint representation" of them in violation of rule 3-310(C)(1) of the Rules of Professional Conduct. It further held that, "[e]ven if the initial conflict waiver was adequate," Haney "never discussed with [respondent] what would happen if either [she] or [appellant] terminated the relationship and never asked her to consent to its further representation of [appellant] in the event that it ceased to represent her . . . ." Thus, when the actual conflict between appellant and respondent "materialized" and Haney "moved to be relieved as [her] counsel[,]" "under [rule] 3-310(C)(2) Haney . . . should have obtained further written consent . . . ."

The court also found Haney "assumed a position that is adverse to [respondent]" by seeking "contempt sanctions against her," "to protect [appellant]." Finally, it noted Haney's assertion "any conflict has past [*sic*] [is] unrealistic and based

contingently on [respondent's] continued cooperation. If [respondent] acts adversely against [appellant's] interest in her deposition or at trial, there is little doubt that Haney . . . would [not] hesitate to take whatever action necessary against her."

DISCUSSION

1. Summary of the Parties' Arguments

Appellant attacks the trial court's ruling on several grounds. First, he contends no conflict of interest exists because respondent remains a plaintiff in the legal malpractice action and, although the order to show cause for contempt was concededly "confrontational," it was "actually beneficial to [respondent's] interest . . . ." (Bold and italics omitted.) Second, appellant denies Haney received "any confidential information" from respondent. Third, he disputes the trial court's rejection of the conflict waiver respondent signed when she initially retained Haney. Finally, appellant claims that given the resulting prejudice to him, the temporal nature of any conflict arising from the filing of the order to show cause for contempt, and respondent's ulterior motive for declining to cooperate in the prosecution of this case, disqualification was too drastic of a remedy.

Respondent argues a conflict of interest exists because of appellant's assertion she is "obligated to reimburse him for the attorneys' fees [he] paid to the Haney Firm" and that Haney "entered the fray squarely on the side of appellant" by employing "intrusive and coercive measures . . . to bring [respondent] into line . . . ." She further cites Haney's attempt to hold her in contempt reflects the existence of a conflict of interest and violated the law firm's duty of loyalty, which included not doing anything that would "injuriously affect a former client." She also claims the trial court properly found the conflict waiver she signed was inadequate. Finally, respondent argues the record supports a finding she disclosed confidential information to Haney.

2. Background

Based on its power to control the conduct of ministerial officers and others to advance the goal of achieving justice in judicial proceedings (Code Civ. Proc., § 128, subd. (a)(5)), a trial court is empowered to disqualify counsel. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.)

"A motion to disqualify a party's counsel may implicate several important interests." (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc., supra,* 20 Cal.4th at p. 1144.) The factors can include "an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.] Nevertheless, determining whether a conflict of interest requires disqualification involves more than just the interests of the parties." (*Id.* at p. 1145.) "'Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.' [Citation.] As we have explained, . . . '[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' [Citation.]" (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.)

The ruling on a motion to disqualify counsel "'is reviewed for abuse of discretion. [Citations.]' [Citation.] As to disputed factual issues, a reviewing court's role is simply to determine whether substantial evidence supports the trial court's findings of fact; 'the reviewing court should not substitute its judgment for . . . express or implied [factual] findings [that are] supported by substantial evidence. [Citations.]' [Citation.] As to the trial court's conclusions of law, however, review is de novo; a disposition that rests on an error of law constitutes an abuse of discretion. [Citations.] The trial court's 'application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.)

3. Haney's Breach of its Ethical Obligations to Respondent

Rule 3-310(C) of the Rules of Professional Conduct declares, "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict . . . ." Under Rule 3-310(E), "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." Based on this rule, courts have recognized there are "[t]wo ethical duties . . . entwined in any attorney-client relationship. First is the attorney's duty of confidentiality" and "second is the attorney's duty of undivided loyalty to the client. [Citation.]" (*City and County of San Francisco v. Cobra Solutions, Inc., supra,* 38 Cal.4th at p. 846.)

The trial court's tentative ruling on the disqualification motion reflects it found Haney violated both of the foregoing duties. We agree.

While "[n]o precise formula can be stated for the determination of whether an attorney is representing conflicting interests" and "cases construing this and other rules of professional conduct largely turn on the individual facts of the relationships between the parties and the nature of the disputes involved" (*Vivitar Corp. v. Broidy* (1983) 143 Cal.App.3d 878, 882), generally a "[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.)

Appellant is correct in arguing that, insofar as he and respondent were and remain plaintiffs in suing defendants for legal malpractice arising from its representation of them before the United States Tax Court, no conflict of interest exists between them.

(*Moxley v. Robertson* (1959) 169 Cal.App.2d 72, 75 ["Because of their joint purpose," in this action "it does not appear that the interests of the two plaintiffs conflicted"].) Respondent claims a conflict of interest arose because appellant insisted she accept responsibility for part of Haney's fees, contrary to the terms of her retainer agreement, and that he threatened to seek reimbursement of half of the fees from her. The record does not support this claim. Respondent's retainer agreement clearly imposes the fee obligation solely on appellant. Nor does respondent's motion to disqualify Haney cite the existence of a dispute over fees as a basis for her change of heart about the litigation. Rather, she claimed to have been "made to feel like a second-class citizen" with "the Haney Firm . . . really aligned with [appellant], instead of being aligned with us both."

But the trial court found and the record supports a finding the plaintiffs had an ongoing dispute over respondent's obligation to cooperate in the prosecution of the legal malpractice action. There are statements in the record that the underlying claim is an asset of appellant and respondent's community estate, and the parties' divorce settlement required respondent to cooperate in the prosecution of this lawsuit. During the hearing on appellant's order to show cause seeking to hold respondent in contempt, his attorney stated that "because of the lack of cooperation of [respondent]" the parties' "agreement relative to the divorce regarding this case . . . is going to be the subject of another matter in the divorce court . . . ." The trial court acknowledged the existence of this conflict in its disqualification order, noting "Haney . . . knew [when respondent executed her retainer agreement] that the plaintiffs were recently divorced and that they had on-going disputes." Thus, it appears a potential conflict of interest did exist which, as the trial court noted, "materialized" when respondent stopped cooperating with the prosecution of the underlying lawsuit.

"[A]utomatic disqualification is not required in all circumstances where representation of one client creates actual or potential conflicts of interests with another client" because "clients may consent in writing [citation] to continued representation by

the conflicted attorney . . . ." (*Sharp v. Next Entertainment Inc.* (2008) 163 Cal.App.4th 410, 429.) Appellant and respondent did execute a conflict waiver. But the trial court described it as "bare boned," inadequate to allow Haney's continued representation of appellant when it sought to compel respondent's cooperation in the malpractice lawsuit.

"In order for there to be valid consent, clients must indicate that they 'know of, understand and acknowledge the presence of a conflict of interest . . . .' [Citation.]" (*Sharp v. Next Entertainment Inc., supra,* 163 Cal.App.4th at p. 429.) "'The concept of informed consent is a familiar one. It signifies that a person making an important decision does so on the basis of adequate knowledge of the facts and an awareness of the consequences of decision.' [Citation.] . . . Once the client has been provided with sufficient information about the situation, the client can make a rational choice, [citation] based upon full disclosures as to the risks of the representations, the potential conflicts involved, and the alternatives available as required by the particular circumstances. [Citation.]" (*Id.* at p. 430.) The conclusory waiver signed by plaintiffs failed to satisfy these requirements.

While Haney withdrew from representing respondent, the court also held "Haney . . . should have obtained further written consent" from respondent "when the plaintiffs' conflict materialized." Appellant contends that given respondent's "declared . . . intention not to cooperate," "seeking a [further] waiver of any . . . conflict from [her]" is "realistically . . . not a possibility." But this is exactly what the Rules of Professional Conduct mandate. Rule 3-310(C)(2) declares, "A member shall not, without the informed written consent of each client . . . [¶] . . . [¶] . . . continue representation of more than one client in a matter in which the interests of the clients actually conflict . . . ." The Drafter's Notes to rule 3-310 clarify that "if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2)." (Discussion, 23 pt. 5 West's

Ann. Codes, Rules (2008 ed.) foll. rule 3-310, p. 815; *Zador Corp. v. Kwan* (1995) 31 Cal.4th 1285, 1295.)

Haney's actions as part of its representation of appellant in seeking to hold respondent in contempt also violated its fiduciary obligation concerning client confidentiality. First, contrary to appellant's assertion, the trial court recognized Haney "represented both of the Keils" and "[p]resumably there [were] confidences shared with you in that relationship . . . conclusively presumed to taint your representation." That is a correct statement of the law. "If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information. [Citation.] Instead, the attorney is presumed to possess confidential information if the subject of the prior representation put the attorney in a position in which confidences material to the current representation would normally have been imparted to counsel. [Citations.]" (*City and County of San Francisco v. Cobra Solutions, Inc., supra*, 38 Cal.4th at p. 847.)

Second, as respondent argues, "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574.) "[T]h[is] prohibition is in the disjunctive: [counsel] may not use information *or* 'do anything which will injuriously affect his former client.'" (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156; see also *City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 323-324, 329.) Again, the trial court found Haney "assumed a position that is adverse to [respondent]" when "[i]t sought contempt sanctions against her . . . in order to protect [appellant]."

Next, appellant claims the trial court's ruling is erroneous because respondent brought the disqualification motion for an "improper motive." Even

assuming the factual premise of this argument, we find it unavailing as well. "'In exercising its discretion with respect to granting or denying a disqualification motion, a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation,'" but "[e]ven if tactical advantages attend the motion or disqualification, that alone does not justify denying an otherwise meritorious motion." (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 599; see also *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 13.) The trial court was apprised of appellant's assertion respondent was using the disqualification motion as a litigation tactic, but decided to grant the request. Appellant has failed to show this ruling was arbitrary or capricious under the circumstances of this case.

4. The Remedy

Finally, appellant contends the trial court abused its discretion by "fail[ing] to consider" the "less drastic alternative" of having "third-party counsel . . . conduct [respondent's] deposition" rather than disqualification of Haney.

Again, the record belies appellant's argument. In its tentative ruling, the court found "even though Haney . . . asserts that any conflict has past [*sic*], the assertion is unrealistic and based contingently on [respondent's] continued cooperation. If [respondent] acts adversely against [appellant's] interest in her deposition or at trial, there is little doubt that Haney . . . would [not] hesitate to take whatever action necessary against her." During the hearing on the disqualification motion, when appellant mentioned the third-party counsel "alternative remedy," the court replied, "I don't believe that is sufficient" or "cures the problem that we have here, citing the "confidences shared with" counsel by the plaintiffs.

Furthermore, none of the cases cited by appellant in support of the alternative remedy support a different result. In *Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, the appellate court affirmed an order denying a

disqualification motion. *Concat LP v. Unilever, PLC* (N.D.Cal. 2004) 350 F.Supp.2d 796 involves an order granting disqualification of counsel. In *Shurance v. Planning Control Intern., Inc.* (9th Cir. 1988) 839 F.2d 1347, the federal appellate court denied a petition seeking leave to file an immediate appeal from an order denying an attorney disqualification motion.

We conclude appellant has failed to show the trial court acted arbitrarily or capriciously in ordering Haney's disqualification.

DISPOSITION

The order is affirmed. The request for judicial notice is granted. Respondent shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.